Some of the False Attacks

on Michael McConnell

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1. The One-Person, One Vote Decisions

The Charge: "McConnell opposes `one person, one vote'" -- People for the American Way.

The Truth: McConnell defended the Supreme court's decisions requiring legislative districts of reasonably equal size. What he criticized was the requirement of "precise mathematical equality," which has led to unconstrained gerrymandering and non-competitive districts.

What McConnell Actually Said About Unequal Apportionment: "Until the early 1960s, the federal courts played no role in legislative districting. By almost any measure of democratic legitimacy, however, the districting process was a disaster. . . .

This style of malapportionment in Tennessee and elsewhere gave rural and agrarian interests a lock on legislative power, despite their minority status. . . . Moreover, the urban and suburban majority had no peaceful political means for redressing the electoral balance. . . .

A districting scheme so malapportioned that a minority faction is in complete control, without regard to democratic sentiment, violates the basic norms of republican government. . . . Constitutional standards under the Republican Form of Government Clause are ill-developed, but surely a government is not `republican' if a minority faction maintains control, and the majority has no means of overturning it."

What McConnell Actually Said About Precise Mathematical Equality: "In order to bring districts as close to `precise mathematical equality' as possible, states must disregard preexisting political boundaries such as cities, townships, and counties. Adherence to these traditional boundaries was, historically, the principal constraint on creative districting, popularly known as `gerrymandering.' Once freed from these traditional constraints by the Supreme Court's `precise mathematical equality rule,' legislative line-drawers were able to draw maps to produce the results they desired, rending elections less a reflection of popular opinion than of legislative craftsmanship. . . . The results? Protection for incumbents, a tendency toward homogenous -- and hence more partisan -- districts, racial and partisan gerrymandering, and ultimately, a widespread sense that elections do not matter."

The Citation: Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harvard Journal of Law and Public Policy 103, 103-04 (2000).

2. Federalism

The Charge: McConnell "celebrates the current Supreme Court's series of 5-4 states' rights rulings, which have impaired the ability of Congress to protect the rights of ordinary Americans and threaten to dismantle many of the legal and social justice gains of the past 70 years." -- People for the American Way

The Truth: Far from celebrating these cases, McConnell has rejected the principle that underlies them. The Court has struck down laws to "protect the rights of ordinary Americans" principally under its theory that the Court has exclusive power to interpret constitutional rights and Congress has no power to interpret constitutional protections more broadly. This principle was first stated in *City of Boerne v. Flores*, 521 U.S. 507 (1997). McConnell wrote one of the most important of the many criticisms of the Court's new rule.

What McConnell Actually Said About Congressional Enforcement of Civil Liberties: "In *Boerne*, the Court erred in assuming that congressional interpretation of the Fourteenth Amendment is illegitimate. The historical record shows that the framers of the Amendment expected Congress, not the Court, to be the primary agent of its enforcement, and that Congress would not necessarily consider itself bound by Court precedents in executing that function. . . .

"Judicial interpretations of the Constitution are often influenced by institutional considerations, such as the principle of judicial restraint, that create `slippage' between the Constitution as enforced and the Constitution itself. . . . But when Congress engages in constitutional interpretation under the enforcement power, it is not so constrained. The democratic values underlying the doctrine of judicial restraint do not apply to Congress. . . . Congress's decision to adopt a more robust, freedom-protective interpretation of the Free Exercise Clause did not `alter' the Constitution or create `new' rights. Rather, RFRA merely liberated the enforcement of free exercise rights from constraints derived from judicial restraint."

The Citation: Michael W. McConnell, *Institutions and Interpretations: A Critique of City of Boerne v. Flores*, 111 Harvard Law Review 153, 194-95 (1997).

3. School Prayer

The Charge: McConnell "has indicated his support for public school prayer." -- Americans United for Separation of Church and State. "McConnell's confirmation would threaten the right of students not to be made captive audiences to religious worship and promotion of religion in public schools." -- People for the American Way.

The Truth: McConnell supports the school prayer decisions and testified against a school prayer amendment. He has opposed prayer at public school graduations and football games.

What McConnell Actually Said About School Prayer: "[O]fficially sponsored and led prayer in public school classrooms would be impossible to maintain today in a way that would be either spiritually valuable or noncoercive. . . .

"I do not believe that officially sponsored, vocal classroom prayer can be administered without effectively coercing those in the minority. And that should not be permitted. . . ."

What McConnell Actually Said About Prayer at Graduation: "I would take pains to emphasize that the concept of coercion cannot, in itself, supply a standard for distinguishing between establishments and nonestablishments, and that it is vital to understand the concept of coercion broadly and realistically. For example, the Court is now being urged to adopt the coercion test in a case involving a public prayer at a junior high school graduation ceremony. I would have thought that gathering a captive audience is a classic example of coercion; participation is hardly voluntary if the cost of avoiding the prayer is to miss one's graduation. Equally seriously, it appears that the content of the prayer was subject to indirect government control, which is a species of coercion. For the Court to embrace the coercion test in this form would be a small step back toward permitting the government to indoctrinate children in the favored civil religion of nondenominational theism."

What McConnell Actually Said About Prayer at Football Games: "If officially sanctioned prayers at public events are unconstitutional, government bodies cannot evade constitutional limitations by clever stratagems. Nor do I have any serious disagreement with the Court's conclusions, based on this record, that the Santa Fe policy had the purpose and effect of perpetuating its prior practice of beginning football games with prayer. . . . [T]he Court's conclusions were more than reasonable.

More importantly, the Court's general approach to the Establishment Clause issue was correct."

The Citations: First quotation: Testimony of Michael McConnell, *Religious Freedom*, Hearing Before the Senate Judiciary Committee, Oct. 20, 1995 (1995 Westlaw 11095849).

Second quotation: Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 University of Chicago Law Review 115, 158-59 (1992).

Third quotation: Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 Pepperdine Law Review 681, 709-10 (2001).

4. Government Religious Observances

The Charge: "McConnell criticized several recent Supreme Court rulings that upheld church-state separation, including *Lee v. Weisman* (1992), which prohibited government-sponsored prayer at school graduation ceremonies, and *County of Allegheny v. ACLU* (1989), which limited government endorsement of religious displays on public property. He said these decisions `have nothing to do with freedom of religion. There is not a single person in these cases who has been hindered or discouraged by government action from following a religious practice or way of life.' (Jan.-Feb. 1993, *American Enterprise*). -- Americans United for Separation of Church and State.

The Truth: McConnell argued for the ban on school-sponsored prayer at graduation even before the case was decided. See page 3.

County of Allegheny is about municipal Christmas displays, which Americans United opposes. McConnell's criticism was that the Court should either have forbidden them or permitted them, but it should not have picked the awkward compromise it did.

In the passage quoted by Americans United, McConnell's point was not to criticize the decisions mentioned, but to criticize the Court's priorities in failing to protect private religious practices with the same rigor displayed in its cases on government sponsored religious practices.

What McConnell Actually Said About These Cases: Two sentences past where Americans United stopped quoting, McConnell said: "My point is not that *Lee v. Weisman* or any of these other cases was wrongly decided. But the Supreme Court and the news media are so preoccupied with the finer points of freedom from religion that far more important cases of genuine freedom of religion have been almost completely neglected." He then gave examples.

What McConnell Actually Said About Prayer at Graduation: See page 3.

What McConnell Actually Said About Government Christmas Displays: After accurately describing the facts of the cases, in which the Court struck down a nativity scene accompanied by greenery and poinsettias, but upheld one accompanied by "a Santa Clause house, reindeer, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a banner stating `Season's Greetings,' and a talking wishing well":

"The Court appears to have arrived at the worst of all possible outcomes. It would be better to forbid the government to have religious symbols at all than to require that they be festooned with the trappings of modern American materialism. After all, no one's religion depends on whether the government displays the symbols of the Christian and Jewish holidays. But if there are to be religious symbols, they should be treated with respect. To allow them only under the conditions approved by the Court makes everyone the loser."

The Citations: On the two cases: Michael McConnell, *Freedom From Religion?*, American Enterprise 34, 36-37 (Jan.-Feb. 1993).

On Christmas displays: Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 University of Chicago Law Review 115, 126-27 (1992).

5. Separation of Church and State

The Charge: "McConnell takes issue with Jefferson's metaphor of the `wall of separation' between church and state, calling it `misleading.'" -- People for the American Way. "McConnell has described church-state separation as never having been a `plausible or attractive conception of proper relations between government and religion in the modern activist state.'" Americans United for Separation of Church and State.

The Truth: This one is partly true, but badly out of context. McConnell supports much of what most people mean by separation, but he does believe the separation metaphor has misled the Court. The one real disagreement he has on this issue with Americans United and People for the American Way is that McConnell would let the government fund secular services (such as education, medical care, treatment for drug addiction, food and shelter for the poor and the homeless) from any service provider willing to provide the service, whether religious or secular. That has been the model through most of American history for higher education, medical care, and most social services. For elementary and secondary education, we have had a different model, one that sharply limited public funds to religious schools. This is a serious disagreement. But it does not mean that McConnell generally wants to unite church and state.

What McConnell Actually Said About the Separation Metaphor: "Separation has never been a plausible or attractive conception of proper relations between government and religion in the modern activist state. [Americans United quote ends here.] To be sure, some aspects of what can be called `separation' are essential, and essentially uncontroversial. The government should not control the institutions of the church; nor should churches have any institutional role, as such, in government. No citizen is entitled to special privileges on account of membership in a favored denomination; nor may there may special disabilities for anyone else. Moreover, the original conception of separation -- that government be strictly limited so as not to invade the province of religion -- remains the best means of preserving religious freedom. Government protects religious freedom best by leaving religiously sensitive matters to the private sphere. But in many areas of life, religion and government both necessarily play a role Indeed, with the growth of the modern welfare-regulatory state, the occasions for overlap increase exponentially, as governments regulate and subsidize activities previously private and often religious. In these many areas of overlap, the idea of `separation between church and state is [Americans United quote starts up again here] either meaningless, or (worse) is a prescription for secularization of areas of life that are properly pluralistic. [Americans United quote ends again here] That is why principles such as neutrality (with respect to government subsidies) and accommodation (with respect to government regulation) have come to replace `separation' in most areas of constitutional conflict."

The Citation: Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should be Excluded from Democratic Deliberation*, 1999 Utah Law Review 639, 640-41.

6. Legislative Chaplains

The Charge: No specific charge here. But McConnell's opinion on legislative chaplains is another clear counter-example to the general charges that he wants government to impose religion on people.

The Truth: In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court upheld legislative chaplains, basically because the First Congress had them. McConnell sharply criticized this decision.

What McConnell Said About Legislative Chaplains: "*Marsh v. Chambers* represents original intent subverting the principle of the rule of law. Unless we can articulate some principle that explains why legislative chaplains might not violate the establishment clause, and demonstrate that that principle continues to be applicable today, we cannot uphold a practice that so clearly violates fundamental principles we recognize under the clause. . . .

The Supreme Court offered no theory whatsoever in *Marsh v. Chambers* . . . So far as one can tell from the Court's opinion, there is simply an exception from the establishment clause for legislative chaplains. It is as if the first amendment read, `Congress shall pass no law respecting an establishment of religion, other than a legislative chaplaincy.' . . . Indeed, it can be said that *Marsh v. Chambers* does not interpret the Constitution at all."

The Citation: Michael W. McConnell, *On Reading the Constitution*, 73 Cornell Law Review 359, 362-63 (1988).

7. Generalized Charges of Extremism

The Charge: "McConnell has a long record of extremism on a broad range of individual rights issues. . . . McConnell starts to make Bork look moderate. This man wants to gut the constitutional protections that Americans count on." -- Barry Lynn, Americans United for Separation of Church and State.

The Truth: This is the most absurd charge of all. McConnell has a long record of positions and activities in support of a broad range of civil liberties, activities that unmistakably mark him as intellectually honest and independent and as a moderate among the range of possible Republican nominees. In addition to the examples above, here are some more:

Bush v. Gore: McConnell has written that in *Bush v. Gore*, the Supreme Court should have given Florida more time to finish a proper recount. "Having rested the decision on the standardless character of the recount ordered by the state court, the logical outcome was to remand under proper constitutional standards." Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 University of Chicago Law Review 657, 674 (2001).

Impeachment: McConnell publicly opposed the impeachment of President Clinton. "Those who feel the Constitution requires the House to impeach the president are misguided, according to Michael McConnell, a prominent University of Utah constitutional law professor who sent an anti-impeachment letter Saturday to House Judiciary Chairman Henry Hyde . . .

"`The inviolability of elections may be the most important constitutional principle that we have,' McConnell wrote. `The best test of whether presidential misconduct rises to the level of impeachment is whether members of his own party are willing to join in the motion.'" John Heilprin, *Rep. Hansen Urging Support for Impeachment*, Salt Lake Tribune (Dec. 16, 1998) (1998 Westlaw 21662101).

Free Speech: McConnell vigorously supports free speech rights, whether or not he agrees with the speaker. "I think the free-speech principle used to be fairly robust. And I consider the high point of this the flag burning cases, where very solid majorities of the Court, including some of the most conservative Justices, voted -- correctly, in my view -- that laws against flag burning are unconstitutional. I consider this to be kind of a high point where people across the spectrum were able to agree upon a way of analyzing free-speech claims. And they would stick to those principles without regard to the political complexion of the case." *Professor Michael W. McConnell's Response*, 29 Pepperdine Law Review 747, 747 (2001).

McConnell co-chairs the Emergency Committee to Defend the First Amendment, with ACLU leader Norman Dorsen.

Representing Black Democrats: McConnell successfully represented the first black mayor of Chicago, Harold Washington, (for free), in his political and legal battle with mostly white and more conservative opponents on the Board of Alderman. *Roti v. Washington*, 500 N.E.2d 463 (Ill. App. 1986).

Human Rights Litigation: McConnell represented three former Democratic Attorneys General (for free) in *McNary v. Haitian Centers Council*, a high profile challenging an order of the first President Bush authorizing deportation of certain aliens who faced persecution in their home countries.

Legal Aid for the Poor: McConnell served on the Board of the Austin Christian Law Center, now the Austin neighborhood branch of Chicago Legal Aid, and chaired its Finance Committee.